FILED
JAN 4 1937
CHARLES ELMORE CR
CLE

SUPREME COURT OF THE UNITED STATES

October Term, 1936

No. 355

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY and W. M. FRANCIS,

Appellants,

vs.

WILLIAM B. HARRISON, INSURANCE COMMISSIONER,

Appellee.

BRIEF FOR APPELLEE

M. J. YEOMANS, *Attorney General of Georgia.*
B. D. MURPHY, *Assistant Attorney General.*
Attorneys for Appellee.

[illegible] PRINTING CO., ATLANTA, GA.

SUBJECT INDEX

	Page
Statement of Case	1
Questions Involved	2
The Georgia Act Is Not Violative of the Due Process Clause	3
The Burden of Establishing the Arbitrary and Unreasonable Nature of the Statute is on the Appellant	9
The Wisdom and Expediency of the Statute are Questions Exclusively for Legislative Determination	10
The Georgia Statute Is Not Arbitrary or Unreasonable	11
Cases Cited by Appellants Distinguished	18
The Georgia Act Was Not Intended Merely to Serve the Interest of Insurance Agents	19
Equal Protection Clause	21

TABLE OF CASES CITED

Adkins v. Children's Hospital, 261 U. S. 525	18,19
Armour & Co. v. North Dakota, 240 U. S. 510	7
Atkins v. Kansas, 191 U. S. 208, 223	7
Bachtel v. Wilson, 204 U. S. 36, 41	24
Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612	7
Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251	26
Bunting v. Oregon, 243 U. S. 526	7
Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 77	11
Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 567	3
Franklin Fire Ins. Co. v. Montoya, 32 N. M. 88	17
Frisbie v. United States, 157 U. S. 160	6
Gant v. Oklahoma City, 289 U. S. 98	9
German Alliance Ins. Co. v. Lewis, 233 U. S. 389	4,22
Green v. Frazier, 253 U. S. 233, 240	9
Hadacheck v. Sebastian, 239 U. S. 394, 408, 414	11
Harden v. Hardy, 169 U. S. 366	7
Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U. S. 151, 158, 159	25
Hauser v. North British & Mercantile Co., 206 N. Y. 455	17
Henderson Bridge Co. v. Henderson, 173 U. S. 592, 615	25

	Page
Hooper v. California, 155 U. S. 648, 657	15
House v. Mayes, 219 U. S. 270	7
Jacobson v. Massachusetts, 197 U. S. 11	6,7
Knoxville Iron Co. v. Harbison, 183 U. S. 13	5
LaTourette v. McMaster, 248 U. S. 465	4,15
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61	24
Louisville & N. R. Co. v. Melton, 218 U. S. 36	24
McCray v. United States, 195 U. S. 27, 55, 56	20
McLean v. Arkansas, 211 U. S. 539	6,7
Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 584	9,25
Minnesota v. Barber, 136 U. S. 313, 320	7
Morehead v. Tipaldo, 56 S. Ct. 918	18
Mugler v. Kansas, 123 U. S. 623	7
Munn v. Illinois, 94 U. S. 113	6,18,25
Nebbia v. New York, 291 U. S. 502	8,10
Norfolk & Western Ry. Co. v. Public Service Comm., 265 U. S. 70	19
Northern Securities Co. v. United States, 193 U. S. 197, 337, 338	8
Northwestern National Ins. Co. v. Fishback, 130 Wash. 490	17
O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251	4,5,12,13,19
Ohio ex rel. Clarke v. Deckebach, 274 U. S. 397	25
Orient Ins. Co. v. Daggs, 172 U. S. 557	22
Ozan Lumber Co. v. Union County Nat. Bank, 202 U. S. 623	22,25
Patterson v. The Eudora, 190 U. S. 169	6
Radice v. New York, 264 U. S. 292	10
Rast v. Van Deman & Lewis Co., 240 U. S. 342	11,25
Schmidinger v. City of Chicago, 226 U. S. 578	7
Sproles v. Binford, 286 U. S. 374	10
Standard Oil Co. v. Marysville, 279 U. S. 582, 586	10,11,17,25,26
State Tax Comrs. v. Jackson, 283 U. S. 527, 537	25
Supreme Council Royal Arcanum v. Behrend, 247 U. S. 397	22
Tanner v. Little, 244 U. S. 369, 385	9
Weaver v. Palmer Brothers Co., 271 U. S. 402, 410	9
Westfall v. United States, 274 U. S. 256, 259	25

TABLE OF CASES CITED

	Page
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522	18
Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552	19

STATUTES CITED

	Page
Georgia Code, 1933, 56-501	11
Georgia Code, 1933, 56-508	16
Georgia Laws, 1935, p. 139	1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1936

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY and W. M. FRANCIS,

Appellants,

vs.

W. B. HARRISON, INSURANCE COMMISSIONER OF GEORGIA,

Appellee.

No. 355

BRIEF FOR APPELLEE

STATEMENT OF CASE

The question involved is whether a Georgia statute is repugnant to the Fourteenth Amendment. The Act is published in Georgia Laws, 1935, at page 139, and is set forth in the appendix to the brief of counsel for appellants.

The challenged statute provides that fire and casualty insurance companies, and companies writing fidelity or surety bonds, shall write or issue policies on Georgia risks only through a resident agent licensed by the Insurance Commissioner of

Georgia. The statute provides that: "the words 'resident agent' as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally and shall not include any salaried employee of any insurance company doing business in this State; but shall include any agents of mutual insurance companies, however compensated." The alleged invalidity of the language just quoted is the basis for appellant's attack upon the law.

The appellant company, which had been licensed in Georgia, applied to the Insurance Commissioner of Georgia for an agent's license for its salaried employee, Francis. The Insurance Commissioner denied the license upon the sole ground that Francis was a salaried employee, raising no question as to his character or qualifications, and stating that but for the inhibition of the statute the license would be granted. Thereupon the company and Francis jointly brought a suit for mandamus against the Insurance Commissioner to require the issuance of a license to Francis. The mandamus was made absolute by the trial judge. This judgment was reversed by the Supreme Court of Georgia. The only ground upon which mandamus was sought was the alleged invalidity of the statute. The trial judge held that the statute was unconstitutional. The Supreme Court of Georgia, in an opinion written by the Chief Justice, two Justices dissenting, reversed the trial court and held the statute to be valid and enforceable.

No question is made by appellee as to the finality of the judgment of the Supreme Court of Georgia. It is conceded that the judgment of the Supreme Court of Georgia is a final determination of the case in the State courts. A stipulation of counsel filed in the Supreme Court of Georgia, while the cause was pending there on rehearing, and after a rehearing had been granted, expresses the agreement of the contending parties that the judgment of that Court should be considered a final determination of the case.

QUESTIONS INVOLVED

The record presents two questions for determination by this Court:

1. May a State, consistently with the due process of law guaranteed by the Federal Constitution, regulate the method whereby insurance companies may compensate their agents for negotiating contracts of insurance with policy holders, or is such a regulation so arbitrary and capricious as to bear no reasonable relation to any matter within the police power of the State, and amount to a deprivation of property or liberty without due process of law?

2. If a State may thus regulate the business of an insurance company, and the relations between insurance companies and insurance agents or brokers, does the Georgia Act of 1935 deny to appellants equal protection of the law because of the alleged discrimination in favor of mutual insurance companies and their agents?

THE GEORGIA ACT IS NOT VIOLATIVE OF THE DUE PROCESS CLAUSE

There can be no doubt that the Georgia Act does restrict liberty of contract on the part of both an insurance company and its agents to the extent that it prescribes, not the amount, but the method of compensation for negotiating insurance contracts.

We recognize the oft asserted principle that liberty of contract is one of the fundamental rights guaranteed by our Constitution, and that a State may not deprive a citizen of the United States of such privilege, or impair it, by the enactment of arbitrary or capricious laws. This is the extent to which the decisions of this court cited by counsel for appellants go.

We also recognize the principle, which goes hand in hand with the one just stated, that liberty of contract is not an absolute right, but is subject to reasonable regulations and prohibitions imposed in the interest of the community. *Chicago B. & Q. R. Co. v. McGuire, 219 U. S., 549, 567.*

The difficulty in each case lies in the application of these principles. If the regulation imposed by the State bears a reasonable relation to a subject matter falling within the police power of the State, and reasonably tends to accomplish a purpose which the State may exercise its police power to

accomplish, the law will stand; otherwise, it must be condemned.

The Georgia statute here attacked relates to the business of insurance. It thus relates to a subject matter falling within the police power of the State. It may be taken as settled, as counsel for appellants concede, that the business of insurance is quasi public in its nature and character, and is so far clothed with a public interest as to make it subject to governmental regulation. *German Alliance Insurance Co. v. Lewis, 233 U. S., 389.*

We think it may also be taken as settled that because the business of insurance is affected with a public interest, those who are engaged in that business or in bringing about its consummation, are also affected with the same interest and subject to the same regulatory power of the State. *La Tourette v. McMaster, 248 U. S., 465.*

In *German Alliance Insurance Company v. Lewis*, the court held that the State of Kansas could constitutionally regulate the premium rates of insurance companies.

In *La Tourette v. McMaster*, the court held that the State of South Carolina could constitutionally limit the privilege of engaging in the business of insurance brokers to residents of that State.

In *O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S., 251*, the court held that the State of New Jersey could constitutionally regulate and limit the commissions to be paid by fire insurance companies to local agents.

In the present case the Act of the General Assembly seeks to regulate, not the amount of the agent's compensation, but the method whereby he shall be compensated. Appellants, while conceding that the State may prescribe the rates for insurance, may limit the privilege of engaging in the insurance brokerage business to residents of the State, and may prescribe the amount of compensation to be paid to insurance agents, contend that a statute regulating the method of compensation is wholly arbitrary and capricious, and that it can bear no reasonable relation to any matter falling within

the police power of the State, or reasonably tend to accomplish any purpose for which the State may exercise its police powers.

The contentions of the appellants here are substantially those made by the insurance company in *O'Gorman & Young v. Hartford Fire Insurance Co.*, supra. The principle stated by the court in that case is controlling here. We quote from the opinion of Mr. Justice Brandeis:

> "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicate that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness."

In the present case appellants contented themselves in the trial court and in the Supreme Court of Georgia, and content themselves here, with a bare assertion that the statute is unreasonable and arbitrary. They offer no factual foundation for overthrowing the statute. The case falls within the rule just quoted.

There are numerous cases in which the police power of the State has been held to justify various restrictions upon the liberty of contract which the appellants here assert is protected by the Fourteenth Amendment. In *Knoxville Iron Co. v. Harbison, 183 U. S., 13,* the court found valid an act of the Legislature of Tennessee which required that store orders or other evidences of indebtedness issued by employers in payment of wages to employees should be redeemed in

cash. In *Frisbie v. United States, 157 U. S., 160,* the court sustained an Act of Congress limiting the fees of attorneys for prosecuting pension claims. In *Munn v. Illinois, 94 U. S., 113,* the court upheld an Illinois statute fixing maximum charges for the storage of grain. In *Patterson v. The Eudora, 190 U. S., 169,* an Act of Congress which prohibited a shipmaster from paying a sailor any part of his wages in advance was held to be valid.

In *McLean v. Arkansas, 211 U. S., 539,* the court upheld an Arkansas statute regulating the method whereby coal miners should be compensated for mining coal. The Act provided that where miners were employed at bushel or ton rates it should be unlawful to pass the output of coal mined by such miner over any screen or other device whereby any part of the value was removed, before the coal was weighed and credited to the employee. The contentions in that case were similar to the contentions here; that is, that the statute was an unwarranted invasion of the liberty of contract secured by the Fourteenth Amendment, and denied to the plaintiff in error equal protection of the law because of a discrimination in favor of operators employing fewer than ten men, The court quoted from *Jacobson v. Massachusetts, 197 U. S. 11,* as follows:

> "The liberty secured by the Constitution of the United States to each person within its jurisdiction does not import an absolute right in each person to be, at all times, and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good."

Following this quotation, the Court said:

> "It is, then, the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health, and welfare of the people.
>
> "It is also true that the police power of the State is not unlimited, and is subject to judicial review; and, when exerted in an arbitrary or oppressive manner, such

laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

"The legislature, being familiar with local conditions, is primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts*, supra; *Mugler v. Kansas, 123 U. S., 623; Minnesota v. Barber, 136 U. S. 313, 320; Atkin v. Kansas, 191 U. S. 208, 223.*

"If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."

McLean v. Arkansas, supra.

Many measures which not only affected the use of private property, but limited the right of private contract, have been examined by this court and found to be consistent with due process of law. For example, a statute of Missouri regulating sales of grain by actual weight and nullifying exchange rules to the contrary, *House v. Mayes, 219 U. S. 270*; a law of North Dakota prohibiting the sale of lard otherwise than in bulk unless put up in one, three or five pound packages, net weight, or some multiple of these numbers, *Armour & Co. v. North Dakota, 240 U. S. 510*; a municipal ordinance of the City of Chicago fixing the weight of the standard loaf of bread, *Schmidinger v. City of Chicago, 226 U. S. 578*; statutes prescribing hours of labor in particular occupations have been found valid in *Harden v. Hardy, 169 U. S. 366*; *Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612*; and *Bunting v. Oregon, 243 U. S. 526.*

Finally in *Nebbia v. New York, 291 U. S. 502*, the court upheld an act of the Legislature of New York establishing a milk control board with power to fix minimum and maximum retail prices, and affirmed the conviction of Nebbia of the offense of selling milk at a price less than the minimum fixed by the Board. In that case, Mr. Justice Roberts, speaking for the majority of the court, said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare and to enforce that policy by legislation adapted to its purposes. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States, 193 U. S. 197, 337, 338.* And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

See also in this connection *Tanner v. Little, 244 U. S., 369, 385; Green v. Frazier, 253 U. S., 233, 240; Gant v. Oklahoma City, 289 U. S., 98.*

THE BURDEN OF ESTABLISHING THE ARBITRARY AND UNREASONABLE NATURE OF THE STATUTE IS ON THE APPELLANT

As already stated, appellants attacked the statute as arbitrary and capricious, and as therefore depriving them of liberty of contract without due process of law, but contented themselves with the bare assertion that the statute is unreasonable and arbitrary. They set forth no factual basis for this contention.

> "It is salutary principle of judicial decision, long emphasized and followed by this court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it."
>
> *Metropolitan Casualty Insurance Co. v. Brownell, 294 U. S., 580, 584; Weaver v. Palmer Brothers Co., 271 U. S. 402, 410.*

No evidence was offered in the trial court by appellants, but the case was heard on the pleadings, the averments of the answer and the amendment to the answer of the appellee being taken as true. The answer and the amendment set forth certain facts which it was alleged constituted a reasonable basis for the regulations imposed by the statute, and a reasonable ground for the classification made by the General Assembly of Georgia. It was not contended by the appellee that the facts narrated in his pleadings were the only facts upon which the General Assembly may have acted in passing the law, but that the facts stated were some of the things which may have been considered by that body in the action taken.

Since neither the pleadings of the appellants, nor those of the appellee, can be taken to negative or disprove the existence of a factual basis for the statute, it cannot be said that appellants have carried the burden of establishing the want of such a factual basis, or that the statute is unreasonable and arbitrary.

THE WISDOM AND EXPEDIENCY OF THE STATUTE ARE QUESTIONS EXCLUSIVELY FOR LEGISLATIVE DETERMINATION

The subject matter of the statute here attacked, that of insurance, is one falling broadly within the police power of the State. The necessity for regulation is established by the nature and character of the business. This much is accepted by appellants. The regulations to be imposed to insure adequate protection of the public welfare in the conduct of the insurance business must of necessity be determined by the legislative body. It is for the legislature, in the exercise of that broad discretion which inherently belongs to it, to determine not only the necessity for regulation, but the means to be employed in accomplishing the purpose at which the regulations are aimed.

> "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment."
>
> *Sproles v. Binford, 286 U. S. 374.*

> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the law maker."
>
> *Radice v. New York, 264 U. S. 292.*

> "We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rest the duty and responsibility of decision."
>
> *Standard Oil Company v. Marysville, 279 U. S. 582, 586.*

With the wisdom or expediency of the statute, the courts are not concerned. Those are questions exclusively for legislative determination. *Nebbia v. New York, 291 U. S. 502, 537.*

"We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome. *Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 77; Hadacheck v. Sebastian, 239 U. S. 394, 408, 414; Rast v. Van Deman & Lewis Co., 240 U. S. 342.*"

Standard Oil Company v. Marysville, supra.

THE GEORGIA STATUTE IS NOT ARBITRARY OR UNREASONABLE

As has been stated by counsel for the appellants, the principles of law which are to be considered are well settled. The difficulty in this case, as in every case, lies in the application of those principles to the particular statute under review.

It is contended by appellants that the Georgia law bears on its face the evidence of its invalidity, when it is considered in connection with facts which may be within the judicial knowledge of the court. It is the contention of the State that the statute relates to a subject clearly within its police power, regulates the relations of those engaged in a business affected with a public interest, and cannot be said, either upon application of facts which may be known or those which may be shown, to be arbitrary or unreasonable.

It is important to note that the statute, in the respect in which it is challenged, relates only to those agents of insurance companies who are engaged in the production of business. The statute requires that policies be written or issued through resident agents, but defines resident agents as those engaged in the solicitation of insurance from the public generally. The statute does not undertake to regulate the method of compensating employees of insurance companies. It might be said with considerable force, that the method whereby an insurance company compensates its employees, such as clerks, stenographers, bookkeepers, and the like, is no concern of the State. No such question is here involved. In their brief counsel quote, at page 19, the provisions of Section 56-501 of the Georgia Code defining insurance agents. The statute under consideration does not relate to those per-

sons who may be agents within the meaning of the broad language of the Code, but only to agents engaged in selling insurance. This being true, the question narrows down to a determination of whether the State, in the exercise of its police power, may prescribe the method whereby insurance companies may compensate those agents who deal directly with the public in bringing their companies into contractual relations with policy holders.

Under the ruling of this court in *O'Gorman & Young v. Hartford Fire Insurance Company*, expenses of doing business incurred by insurance companies which bear a direct relation to the premiums charged may be regulated by the State. The compensation paid to the agent who solicits the business and brings it to the books of the company, however measured, must of necessity bear a direct relation to the rate of premium charged. This is true because the cost of obtaining business must be met before the relationship of insured and insurer comes into existence in its fullest sense. The cost of procuring business is wholly separate and apart from the expense incident to handling the business after it is obtained, and the cost of meeting losses as they occur. Thus every insurance company must first meet the cost of production out of the premium collected. Only the balance is available to pay other operating expenses, maintain reserves and meet losses. The cost of production does not affect the cost of carrying the risk. Administration expenses, profits, losses, and other expenses of carrying the risk are reflected in the premium rate, but operate to fix the premium rate only by indirection. On the other hand, the cost of production, of selling the insurance, directly affects the premium rate and actually amounts to a direct charge upon the policy holder. It may be said that this argument supports only the view that the State may regulate the amount of the commissions. We think it supports the view that the State may regulate the method of compensation. Since the expense of obtaining business amounts to a direct charge upon the policy holder, it seems to necessarily follow that the State may require that it be related to the premium charged, so that the public and the State may know how much of the premium paid by each policy holder covers the cost of writing his

policy, and how much goes to purchase the protection for which he pays.

The difficulty of relating the cost of production to the premium where agents are compensated by salaries is obvious. In such cases the compensation of the agent is arbitrarily fixed by agreement between the company and the agent, and bears no sort of relation to the amount of business which he may obtain for the company.

The power of the State to prescribe the amount of compensation which may be paid to agents negotiating insurance contracts is meaningless if the method of compensation cannot be prescribed. It would be obviously impossible for the legislature to fix the salaries of insurance agents other than upon the basis of the amount of business produced, which is but another way of limiting commissions. If it is competent for a State to prescribe the amount of compensation of an insurance agent, it seems to follow that the State may take such steps as may be necessary to enable it to effectively exercise that power. Certainly it may require that the cost of production shall be apportioned to the premium charged.

It would be manifestly impossible for the State to require or preserve any degree of uniformity in the scale of charges for the production of insurance business, if the method of compensating local agents or brokers is left entirely to the companies and their agents. Lack of uniformity in the permitted or actual charges for this class of service may, as was said by the Court in *O'Gorman & Young v. Hartford Fire Insurance Company*, *supra*, "encourage unfair discrimination among policy holders by facilitating the forbidden practice of rebating." It may be that this argument would seem more appropriate in support of legislative action fixing commissions, but it does have a bearing upon the statute now under consideration since, as already stated, the power of the State to require uniformity in the charges for this service can be preserved only by prescribing the method whereby agents are compensated. As a matter of fact, as the court judicially knows, the common practice in the operation of the business of stock insurance companies is to compensate agents on a commission basis. As is alleged by the answer, practically

all insurance written by stock companies is written on this basis. It would not be possible to require or preserve any uniform scale for compensating such agents on any other basis.

Appellants concede that the State "undoubtedly has the right to regulate insurance charges," and to that end may place a limitation against excessive agency costs. They strongly insist, however, that the power to fix the rate of compensation paid to agents marks the ultimate extent to which the police power of the State may be allowed to be extended, and that the method of compensation bears no sort of relation to any regulation of insurance charges. It seems a somewhat extreme position to say that a State may fix insurance premium rates, but may not regulate the items which directly produces the rates. The contention of appellants that the Georgia statute is not reasonably adapted to accomplishing the end of preventing excessive agency costs, presupposes that insurance companies pay and will pay only reasonable salaries to salaried employees engaged in producing business. Whether the compensation of such a salaried employee is reasonable or unreasonable, as related to the production of business, would depend entirely upon the amount of business produced by him. It thus appears that agency costs, which must necessarily directly affect the premium rates, must ultimately, in any event, be related to the business done. What the Georgia statute actually provides is that insurance companies and their agents may exercise full liberty of contract with respect to the compensation to be paid the agent for producing business, provided such compensation is measured by the business done and related to the premium charged. A statute so requiring agency costs to relate to the business produced by the agent seems clearly within the police power of the State.

The answer of the defendant (R. 9) avers that substantially ninety-five per cent of the fire and casualty insurance written on risks located in the State of Georgia by stock insurance companies is written by agents who are compensated on a commission basis. This averment of the answer is uncontradicted, and must be taken as true. The amended answer avers (R. 11) that while the agents of stock insurance companies operate under contracts with their companies, as a

matter of fact, most, if not all of them, exercise an independent business in that they solicit and write fire and casualty insurance and negotiate surety contracts without any reference to the insurance company in which the risk is to be placed; that such agents have established customers who place their insurance business with agents, leaving to the discretion of the agent the company in which the risk is to be written. These facts must also be taken as true. They establish that practically all of the insurance business of the classes dealt with in the Act is done by insurance brokers, whose business is dependent upon their maintaining the good will of their customers. The answer avers that the public is interested in insuring the fidelity of these insurance brokers to the trust imposed in them by their customers, and that it is a matter of public concern that their fidelity to this trust be insured by the method adopted by the act. Counsel for the appellants contend that the position thus asserted by appellee is shocking in that it places a premium upon disloyalty to insurance companies on the part of their agents. In *LaTourette v. McMaster*, supra, this court said:

> "And it necessarily follows that, as insurance is affected with a public interest, those engaged in it, or who bring about its consummation are affected with the same interest and subject to regulations as it is. A broker is so engaged—is an instrument of such consummation. The statute makes him the representative of the insured. He is also the representative of the insurer. (*Hooper v. California, 155 U. S. 648, 657*), *and his fidelity to both may be the concern of the state to secure.* As was said by the Supreme Court of the State: 'It is important for the protection of the interest of the people of the State that their business should be in the hands of competent and trustworthy persons.'" (Italics ours)

The Georgia Statute makes an insurance broker—an agent—the representative of the insurer, and by the facts stated in the answer of the appellee he is also the representative of the insured. It is the concern of the State to insure his fidelity to both, and that he be a competent and trustworthy person. In the Goergia statute the State has adopted, as a means of insuring such fidelity and trustworthiness, a provision

fixing the method of compensation so as to make the agent dependent upon both the company and the insured. It can be no more said that requiring him to be compensated on a commission basis invites disloyalty to the company, than that to permit him to be compensated on a salary basis invites disloyalty to his customer.

The answer of the appellee alleges that it is necessary for the insurance commissioner to have access to the local agents records of insurance companies in order to collect the premium tax imposed by the State, and that where a stock company follows the practice of having policies signed by a salaried employee, who in most cases is a mere clerk, the agency records are not available to him because the premium account is carried in an office or agency of the company in another State. Appellants say that this affords no reason for the challenged provision of the statute, because the statute itself requires every resident agent to keep such records as may be necessary for the collection of the premium tax. The statute does require resident agents to keep such records and furnish such information as may be required to aid the Commissioner in the collection of premium taxes, but the provision has reference only to resident agents as defined by the Act. It does not include salaried employees.

Nothing in the argument of appellants impairs the allegation of the answer that the only cases in which stock companies follow the practice of having policies signed by salaried employees are those where the contract is actually negotiated out of the State, by an agent located elsewhere, and is signed in Georgia by a mere clerk in order to technically comply with the Georgia law requiring that such policies be written or issued through a resident agent licensed by the Insurance Commissioner; and that in such cases it is impossible for the Insurance Commissioner to verify returns made for the assessment of premium taxes, because the premium account is carried in the out-of-state office. In this connection, it should be noted that the Act of 1935, in so far as it requires that fire and casualty insurance policies be written or issued through a licensed resident agent, simply reenacts an earlier act of 1925 codified as Section 56-508 of the Code of 1933. While records of premium accounts are available for inspec-

tion by the Georgia Commissioner, wherever kept, the difficulty of examining records kept in distant states is apparent. Certainly the allegations of the answer indicate the existence of conditions which had resulted in a loss of revenue to the State.

Counsel for appellants relate an assumed example of the operation of the Georgia Act of 1935, and suppose that a salaried employee of an insurance company might negotiate an agreement for a contract of insurance, and do all the things necessary to bring about its consummation, but would be required to call in an insurance broker or agent, working on a commission basis, to sign the policy, and pay such broker or agent the full normal commission on a transaction with which he had had no connection. The fact that the act may work hardships on insurance companies, or their agents, affords no reason for declaring it invalid. *Standard Oil Company v. Marysville, supra.* There is nothing in the Georgia statute which requires a licensed agent to devote his entire time to the business of writing insurance on a commission basis (C/f Hauser v. North British & Mercantile Ins. Co., 206 N. Y. 455); and nothing which limits the number of agents which a company may employ (C/f Franklin Fire Ins. Co. v. Montoya, et al., 32 N. M. 88; North Western National Ins. Co. v. Fishback, 130 Wash. 490). Consequently no such case as that supposed by appellants could exist. No question is made here as to the validity of the provision which requires payment of the full nominal commission to the agent who issues the policy. However, the language of the statute is that, "the full commission thereon (meaning thereby the commission paid for the production of business by him), shall be paid to such resident agent." Resident agents, as already stated, are defined by the act as "agents engaged in the solicitation of such business from the public generally." A person employed on a salary basis by an insurance company for some purpose other than the solicitation of business might be licensed to solicit business under the act of 1935, provided the company would compensate him on a commission basis for his services in soliciting business. There is nothing in the statute which prevents such an employee being licensed. It thus appears that the act can not be construed to require

an insurance company to pay full commissions to an agent who has no connection with procuring the business. This is manifestly true because the statute requires the payment of full commissions only to the agent producing the business.

CASES CITED BY APPELLANTS DISTINGUISHED

In the trial court and in the Supreme Court of Georgia, counsel for appellants relied upon *Adkins v. Children's Hospital, 261 U. S., 525*; *Morehead v. Tipaldo, 56 S. Ct. 918* and similar cases. The same cases are cited in the brief in this court. These cases do not relate to subjects falling within the police power of the State, or to businesses which are clothed with a public interest.

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S., 522, is not in point. There the attack was upon a statute which established a state agency to fix wages of employees in certain industries. The court held that the declaration by the legislature that a business is affected with a public interest is not conclusive of the question. The court did not determine whether the particular business should be so classified, holding that such a classification did not justify the regulations imposed by the act, which rested solely upon the avowed purpose to secure continuity of food, clothing and fuel supply. As was shown by the opinion of the court, there was no necessity for regulation of the particular industry to obtain such continuity of supply, and the purpose at which the legislation was directed and the object of the legislature were not within the police power of the State. The court quoted from *Munn v. Illinois, 94 U. S. 113*, in part as follows:

> "When, therefore, one devotes his property to a use in which the public has an interest, he in fact grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

The gist of the decision in the Wolff Packing Company case is that a State may not impose regulations for the purpose

of securing continuance of a business merely clothed with a public interest. This is not a ruling that the State may not regulate such a business so long as it is continued. Moreover, the regulations dealt with in that case had only a remote and indirect effect upon the public. Wages paid in industries are necessarily reflected in prices charged for commodities, but they are not directly related to such prices. In the insurance field, the compensation paid agents for producing business relates directly to the premium charged.

Wolff Packing Company v. Court of Industrial Relations, 267 U. S. 552, is a continuance of the earlier case already referred to. What has been said with reference to the first Wolff Packing Company case also applies to the second case.

In *Norfolk & Western Railway Co. v. Public Service Commission, 265 U. S. 70,* the Court simply stated that the power of a State to regulate a public carrier does not justify unnecessary or arbitrary interference with its operation. In that case, however, the regulations challenged as arbitrary and unreasonable were upheld.

Adkins v. Children's Hospital, supra, and other cases cited by appellants, which hold that a state may not fix wages in private employment cannot have application here. Under the rule in *O'Gorman & Young v. Hartford Fire Insurance Company,* the State does have power to prescribe the rate of compensation to be paid agents of insurance companies engaged in producing insurance business.

THE GEORGIA ACT WAS NOT INTENDED MERELY TO SERVE THE INTEREST OF INSURANCE AGENTS

Appellants contend, as a last attack upon the Georgia Act, that it was obviously intended to serve those agents of insurance companies who work on a commission basis. As we have already shown, there is nothing in the statute from which such an inference can be drawn. At page 16 of their brief, counsel say that the act should have been entitled an act "to enforce the payment of full commissions to insurance brokers on business with which they have had no connection." We might, with equal logic, say that the act should have been entitled an act "to prevent the payment of ex-

orbitant salaries, wholly unrelated to the business done, to insurance agents." The idea that the act was designed to further the interest of insurance agents is founded upon no facts appearing in the record, or language used by the Georgia Legislature. There is nothing in the statute upon which such a theory can be logically based. The law already required Georgia policies to be issued by resident agents. It is alleged by the answer, and it is a fact, that substantially all of the insurance written by stock companies in Georgia is written by commissioned agents. Since there was no earlier law upon the subject, it must be assumed that the insurance companies have done business in this way because they consider it advantageous to do so. The statute does no more than require that the agent who purports to act for the company, in name, in issuing a policy, must be the agent of the company in fact. It works no greater hardship upon insurance companies than to eliminate the practice of issuing policies through mere figurehead agents who had nothing to do with the production of business. This is alleged by the answer to be the purpose for which the complaining company desired a license for its employee Francis.

The motive and purpose of the General Assembly in adopting this act may not be inquired into by the court.

> "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said: from the beginning no case can be found announcing such a doctrine and, on the contrary, the doctrine of a number of cases is inconsistent with its existence."
>
> *McCray v. United States,*
> *195 U. S. 27, 55, 56.*

The Court is not concerned with the wisdom and propriety of the act, but with the power of the legislature to adopt it. If it is found that the legislature had such power, the statute must be upheld, even though it may appear that it is unwise legislation, or that it operates oppressively upon those who may be subject to it, or even that it affords special privileges to one class of citizens at the expense of another.

EQUAL PROTECTION CLAUSE

It is contended that the Georgia statute, even if not in violation of the due process clause of the Fourteenth Amendment, must fall because it violates the equal protection clause of that amendment in that it discriminates in favor of mutual insurance companies and their agents.

The argument of appellants apparently concedes that the radical differences between stock insurance companies, and those operating upon the mutual plan, justify classification as between such companies, but it is contended that these differences bear no relation to the method of compensating the agents of the respective classes of companies, and that therefore the Georgia act, which prescribes a method for compensating the agents of stock companies, but leaves mutual companies and their agents free to agree upon a method of compensation, is discriminatory and invalid.

The differences between stock companies and mutual companies are well recognized, and, as was said by the Supreme Court of Georgia in the present case, are radical. A contract of mutual insurance is in substance a partnership agreement whereby each insured becomes also an insurer. The mutual insurance contract is insurance in its purest form. It contemplates a distribution of the loss of a policy holder among all policy holders in proportion to the risk assumed for each. A contract of insurance between a stock insurance company and a policy holder is strictly an indemnity contract. The loss is not distributed among all policy holders, except in so far as the volume of losses may indirectly operate to fix future premium rates, but falls directly upon the company. The premium paid becomes the absolute property of the company and the policy holder has no further interest in it. In the case of mutual insurance, when the expense of administration is met and losses insured against are provided for, the remainder of the premium is returned proportionately to the policy holder in the from of dividends. A mutual insurance company has no stockholders except its policy holders; they alone own the company.

These differences between stock companies and mutual

companies have been widely recognized by statutory provisions in Georgia and other States and by decisions of this court and of various State courts. In *German Alliance Insurance Co. v. Lewis, supra*, the statute of Kansas fixing premium rates was attacked as unconstitutional upon the ground that it exempted from its operation farmers' mutual insurance companies insuring only farm property. The court said:

> "The provision of the statute is, 'That nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this State, and insuring only farm property.' The distinction is therefore between cooperative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of cooperative companies, and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co. v. Union County Nat. Bank, 202 U. S. 623.* There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. *Orient Ins. Co. v. Daggs, 172 U. S. 557.*"

See also in this connection *Supreme Council Royal Arcanum v. Behrend, 247 U. S. 397.*

Mutual insurance companies operate upon a basis entirely different from that of stock companies. As already stated, the mutual contract is one contemplating distribution of

losses, while the stock contract is purely one of indemnity. Mutual companies do not operate for profit, but in order to secure protection to their policy holders at the lowest possible cost. Stock companies operate strictly for the purpose of pecuniary gain to the stock holders. In the case of mutual insurance companies, as disclosed by the answer, the practice is to write policies through salaried employees, because the cost of producing business is not, as is the case with stock companies, a thing wholly separate and apart from the cost of carrying the risk, but the entire cost of operation, including the expense of producing business, maintaining reserves and meeting losses, is met out of the premiums collected, and the balance returned to the policy holders pro rata in the form of dividends. As stated, the policy holders own the company; they really carry their own risk. Since any extraordinary expense of operation may serve, not to increase premiums, but to reduce dividends, and are necessarily within the control of the policy holders, who own the company, the necessity for protection by the State against exorbitant premiums does not exist.

The amount of the compensation of the agent of a mutual company may be reflected in the premium charged, but since the premium paid by the policy holder is in fact a mere deposit out of which his proportionate share of all expenses of operation are to be met, the balance to be returned to him, the amount of the deposit is really immaterial. The policy holders, having control of the company, can relate the compensation of the agent to the business he does. Such is not the case with respect to stock companies, where the company and the policy holder deal at arm's length, and the policy holder has no voice in determining the compensation of the agent. There is no necessity for legislative action to require that the compensation of an agent of a mutual company be related to the business he does in order to protect the public who deal with such agent in entering upon contracts of mutual insurance, because the policy holder immediately becomes a part owner of the company.

As is stated in the answer, a salaried employee of a stock insurance company is interested only in the company. He is not interested in his customer, and has no incentive to pro-

tect his customer. This is not true with respect to the agent of a mutual company, because the customer immediately becomes, in a limited sense, his employer and a part owner of the company for which he works. The amount of the compensation paid persons who consummate contracts of mutual insurance is not one of public concern because the profits from the operation of the mutual company are returned to the policy holder. It makes no substantial difference to the holder of a mutual policy whether the premium rate is high or low, if ultimately all of the amount paid except the cost of carrying the risk is returned to him in the form of a dividend.

The Supreme Court of Georgia, in the present case, has held that the radical differences between mutual insurance companies and stock insurance companies form a reasonable basis for the classification made by the Georgia legislature.

It is contended by the appellants that the classification is wholly arbitrary and unreasonable. The rules by which this contention must be tested are set forth in the opinion of this court in *Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61,* as follows:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, *if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.* 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel v. Wilson,* 204 U. S. 36, 41; *Louisville & N. R. Co. v. Melton,*

218 U. S. 36; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 256; *Munn v. Illinois*, 94 U. S. 113, 132; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 615." (Italics ours).

In *Metropolitan Casualty Co. v. Brownell*, *294 U. S. 580*, this court upheld an Indiana statute applicable only to insurance corporations organized in other States, which forbade them to insert in their policies certain restrictions permitted to domestic companies. The court said:

> "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. *Rast v. Van Deman & L. Co., 240 U. S. 342, 357; State Tax Comrs. v. Jackson, 283 U. S. 527, 537.* . . .
>
> "It was competent for the legislature to determine whether such differences exist, and upon the basis of those differences, and in the exercise of a legislative judgment, to make choice of the method of guarding against the evil aimed at. *Standard Oil Co. v. Marysville, 279 U. S. 582, 584; Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U. S. 151, 158, 159.* It could likewise decide whether the differences are general enough, as respects foreign companies, to call upon it in the exercise of legislative judgment, not shown to be irrational, to say whether the legislative prohibition should be applied to them as a class rather than to members of it selected by more empirical methods. *Ohio ex rel. Clarke v. Deckebach, supra (274 U. S. 397); Westfall v. United States, 274 U. S. 256, 259.*"

"Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary. *Standard Oil Co. v. Marysville*, 279 U. S. 582, 586, 587."

Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251.

We recognize the principle stated by counsel for appellants, and by the dissenting Justices of the Supreme Court of Georgia in the present case, that a mere difference is not enough to afford a reasonable basis for a legislative classification. The differences between stock insurance companies and mutual insurance companies, found by the Georgia legislature to afford a sufficient basis for classification, are not mere differences, but radical differences; they relate to the very nature and character of the contracts of the respective companies, and affect every phase of the business. Such a fundamental difference between a company contracting with a policy holder who immediately becomes a part owner of the business, and a company contracting with a policy holder with whom it deals at arm's length, and who has no voice in the management of its affairs, but an interest only to enforce his contract according to its terms in the event the contingency insured against arises, must of necessity relate to and affect every step by either party which brings about the relationship of insured and insurer.

Appellants have offered no factual basis for the declaration that the classification of the Georgia act is purely arbitrary and unreasonable; every presumption in favor of the validity of the enactment must be indulged in. In the absence of a clear showing that the classification is arbitrary and unreasonable the presumption that the legislature had before it facts which warranted the action taken must prevail.

Respectfully submitted,

M. J. YEOMANS,
Attorney General of Georgia.
B. D. MURPHY,
Assistant Attorney General
of Georgia.
Attorneys for Appellee.

P. O. Address,
112 State Capitol, Atlanta, Georgia.